

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

JAX PORT EXPRESS, INC. D/B/A GATOR CITY TAXI<sup>1</sup>

Employer

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL 673

Petitioner

Case 13-RC-20625  
(Formerly 12-RC-8651)

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.<sup>2</sup>

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>3</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>4</sup>

3. The labor organization involved claim to represent certain employees of the Employer.

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<sup>1</sup> The names of the parties appear as amended at the hearing.

<sup>2</sup> On July 10, 2001, the General Counsel of the Board issued an Order transferring Case 12-RC-8651 to Region 13 of the Board as Case 13-RC-20625 for the issuance of a Decision by the undersigned. Pursuant to said Order, the case will automatically transfer back to Region 12 as Case 12-RC-8651 upon issuance of this Decision and Order.

<sup>3</sup> The positions of the parties as stated at the hearing and in their briefs have been carefully considered.

<sup>4</sup> The Employer is a corporation engaged in the business of operating a taxicab service.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act for the reasons discussed below:

### **FACTS**

The Employer maintains an office and place of business located in Jacksonville, Florida. The Employer possesses a permit, or a “medallion” for each vehicle issued by the City of Jacksonville, which enables the Employer’s vehicles for hire to operate as taxicabs in Jacksonville. The Employer sells operating rights for taxicabs and provides a dispatching service to drivers interested in driving its taxicabs. Although the number fluctuates, at the time of the hearing, there were approximately 225 to 250 day lease drivers and approximately 87 owner/operator drivers operating taxicabs under the Employer’s permit.

The Petitioner seeks to represent all regularly scheduled full-time and part-time taxicab drivers who are employed at the Employer’s Jacksonville, Florida, facility. The Employer, however, contends that the petition should be dismissed on the basis that the cab drivers, classified as owner-operators and day lease drivers, whom the Petitioner seeks to represent, are independent contractors and not employees within the meaning of the Act. There is no history of collective bargaining regarding the drivers in the petitioned-for unit.

Primarily responsible for the Employer’s overall operation are Cal Rawlings, Chief Operating Officer; Jack Klug, Operations Manager; Grady Braddock, Jr., General Manager; and Bob Pate, Assistant Manager to Jack Klug and Safety Director. Linda Klug oversees administrative personnel, administration of the staff, and the office. Gator City Taxi also has a maintenance area; a communications area, where the dispatchers and call-takers are located; and service representatives who take payments or the fees from the drivers.

Individuals interested in driving taxicabs within Jacksonville must obtain and maintain a valid for-hire driver’s permit from the Public Safety Department (herein “Department”). To obtain a for-hire driver’s permit, an individual must submit to the Department an application, obtained from the owner of

the vehicle for hire the individual intends to drive, providing his name, age, residence, description, photograph, signature, and criminal record, if any, along with a twenty-five dollar application fee. The Department, upon the request of an applicant, may issue a temporary permit, pending the Department's complete check of the applicant's criminal record. Upon completion of an applicant's background check, the Department may either issue the for-hire driver's permit or revoke the temporary permit previously issued. There is no indication in the record that the Employer is involved in any of the above procedures, other than providing the applicant with the form to fill out. There is no evidence that the Employer requires drivers to have prior training or taxicab driving experience or that drivers have any specific knowledge of Jacksonville and its surrounding areas.

Gator City Taxi has two classifications of drivers: "owner-operators" and "day-lease drivers." An owner-operator is one who owns the vehicle that he utilizes in his business as a taxicab operator, whereas a lease driver is one who leases a vehicle from the Employer to utilize in his business. Prospective drivers have sole discretion to decide whether to become a day-lease driver or an owner-operator. The Employer charges drivers a flat rate to lease its vehicles and these fees are the only compensation the Employer receives from its drivers. Rates do not fluctuate or vary depending on the drivers' earnings, work schedule, or miles driven.

Owner-operators pay \$270 a week for a license to operate the vehicle as a Gator City taxi regardless of whether they work in the city or at the airport, plus various fees and deposits. As a rule, they also execute a lease or finance payment on the vehicle itself. Owner-operators have the option to sublease their vehicle to one other driver for an additional fee of \$100 or \$125 per week. Day-lease drivers cannot sublease their vehicles to other drivers. Owner-operators report in to the company once a week on set days. Owner-operators can purchase a car on their own and put it in the Employer's fleet if they choose not to purchase a vehicle directly from the Employer. But if a driver purchases a vehicle from the Employer, the title to the vehicle remains in the Employer's name until the vehicle has been paid for completely. When payment equivalent to the purchase price of a vehicle is reached, the title to that

vehicle is transferred into the driver's name. Currently, no owner-operators actually own the vehicle they operate for the Employer.

The Employer charges day-lease drivers \$80 per 24-hour period for the vehicle lease. A day-lease driver who works at the airport pays \$85 a day for his lease. Day-lease drivers can lease their vehicle on a daily or weekly basis, but the daily rate remains the same for both options. By leasing on a weekly basis, however, day-lease drivers are required to pay the daily rate for six days only and receive the seventh day free. Day-lease drivers are assigned a time range during the day to come to the Employer's facility and pay their lease fees. At the facility, they must undergo "hood checks" before they can pay out. A hood check is simply an inspection of the vehicle to ensure that the vehicle has all the fluids its needs to operate.

#### Driver Orientation and Training

Drivers undergo an orientation when they initially sign on with the Employer, which typically lasts about four hours. During this orientation course, the Employer reviews with drivers various documents, not listed in the record, provided in a driver package. Drivers are then taken out on the street and taught how to operate everything inside the taxicab, such as the computer dispatch system, the fare meter, and the credit card/voucher system. The Employer also reviews with drivers city ordinance requirements and Federal Communications Commission (FCC) regulations pertaining to radio dispatch. Drivers are also given a defensive driving course when they enroll and again if they become involved in an accident. After the initial orientation, drivers do not receive any other training on the job, unless they request it. Upon request, drivers may view training videos pertaining to various subjects, including safety.

#### Policies and Operations

The City of Jacksonville and the Jax Port Authority (which regulates taxicab operations at the Jacksonville International Airport) issue rules and regulations applicable to the drivers. The Employer does not maintain any written employees policies or post any rules for the drivers. The only manual

given to drivers is one that explains the Employer's computerized dispatch system installed in each vehicle.

All of the Employer's vehicles that operate for-hire within the City of Jacksonville bear permits issued by the city. The Employer obtains and maintains the city permits for all vehicles operating under its name. Thus, all of the Employer's vehicles, driven by owner-operators and day-lease drivers, can operate as vehicles for-hire within the city of Jacksonville. Drivers who work at the airport must have vehicles that are permitted to operate at the airport. Drivers who choose to work in Jacksonville Beach must drive vehicles that are permitted to work in Jacksonville Beach. Consequently, drivers who operate at the airport and the beach drive vehicles outfitted with permits issued for the airport and the beach, respectively.

The Employer does not require drivers to work a set number of hours during any period and does not police the hours actually worked by drivers. The Employer has no rules that require drivers to work at all. Drivers can take breaks at their discretion and their breaks are not limited in duration. The Employer does not restrict where or when drivers can operate beyond the regulations imposed by the City of Jacksonville, the Jax Port Authority, and the City of Jacksonville Beach. Drivers are responsible for the costs associated with operating their taxicabs on a daily basis, such as gas purchases, fees associated with obtaining required permits and licenses, payment of traffic tickets, and road tolls. Drivers are permitted to use their vehicles for personal business and matters.

There are various ways by which drivers can obtain fares for business. First, all of the Employer's vehicles are equipped with a 24-hour dispatch system, which the drivers can utilize. The use of the dispatch system is strictly optional. When a driver logs into the dispatch system, he or she is automatically "booked" into the geographical zone in which he is located at the time of log-in. Calls for services are dispatched to drivers on a "first-in, first-out," basis determined by the order drivers log into the system. Drivers who are dispatched for a service call have a minute to accept. If they do not accept in a minute, then the computer will re-dispatch the call. If they still do not accept, the computer assumes the driver is not working and "books off," or suspends, the driver for one hour. Suspended drivers can book

back on once the suspension period is over. Drivers who choose to use the dispatch service are allowed to reject one fare in a 24-hour period that is offered through the system by entering the reject function on the computer. If they reject a second fare, the computer will automatically book them off and suspend them for one hour, so they have to log back in to receive fares. Once a driver accepts a fare from dispatch, city ordinance does not allow a driver to refuse to convey a passenger without meeting certain guidelines. Second, drivers can pick up “flags” or individuals standing on the curb who need transportation. Third, drivers can create their own business with “personals”—handing out business cards and using cell phones or pagers. Fourth, drivers can also utilize taxicab stands, which are areas set aside under city ordinance for taxicabs or hotels where taxicabs can line up for passengers.

At the airport, a starter, who is an employee of Gator City Taxi, meets passengers coming out of the airport, obtains the passengers’ destination information, and then assigns them to the taxicab that is next in line. Once a taxicab is sent out with its passenger, the starter calls the holding facility where drivers wait and requests additional taxicabs to drive up to the door. Drivers are not required to work at the airport, but can do so on a voluntary basis as space allows. There are currently 53 drivers who work at the airport all the time. At any given time, the Employer only has space for a total of 38 cabs at the airport. After four o’clock in the afternoon, however, owner-operators are allowed to come to the airport to ensure there are sufficient taxicabs available for airport passengers.

Jacksonville Beach also has its own dispatch system, which operates through a two-way radio system. This radio system has limited range so drivers must be located within the beach area to access the beach dispatch. The beach radio-dispatch system is not integrated with the Employer’s dispatch system utilized in the city.

Jacksonville ordinances require that a hired driver be clean and neat. Under the ordinance, drivers must wear a uniform if a taxicab company has registered one with the appropriate regulating entity. To that end, the Employer has a dress code for all drivers. All drivers must wear white shirts, black pants, and black dress shoes. Airport drivers must also wear a black tie. The Employer enforces the dress code in two ways. If the first-up driver at the airport is not in proper attire, the starter turns away

that driver and he/she is not allowed to work until he/she is in the proper attire. The Employer also looks to see if drivers are in proper attire when they come to the facility to make their payments. However, if a driver is not properly attired when he comes in to pay, the Employer will still allow the driver to pay out but counsel them if the problem continues.

There is no formal discipline policy for the drivers and the Employer does not maintain a systematic way of evaluating drivers. Drivers are informed at the time they enter into their agreement with the Employer that they have certain guidelines to comply with and that they may be subject to counseling when they fail to comply. When a complaint is made against a driver, the Employer will check to see if that particular driver has had similar complaints in the past. The Employer will consider and provide drivers with counseling on an individual basis based on circumstances. Drivers can be suspended for a specified period of time if they engage in certain prohibited acts, such as refusing a fare at the airport or refusing to accept vouchers or credit card fares. Repeated complaints or violations of rules and regulations can result in the termination of a driver's agreement. Contracts may be canceled for reasons listed in individual contracts or if drivers fail to make payments or fail to comply with regulations set forth by city ordinances or Jax Port Authority.

#### Compensation and Benefits

Neither owner-operators nor day-lease drivers receive any form of compensation from the Employer for operating taxicabs. Drivers retain all fares and tips that they generate. Drivers may receive their fares and tips in cash, vouchers, or by credit card payment. For vouchers, the Employer pays driver for the value of the voucher in cash at the time when vouchers are turned in. Vouchers can be for the meter rate, but are typically discounted some percentage below the meter rate. The Employer also pays drivers in cash, upon submission of credit card tickets, the full value of the fare, less a five percent processing fee. Drivers are not required to report any of their earnings to the Employer and the Employer does not withhold any taxes.

The Employer does not offer or provide any fringe benefits or health plans to the drivers. However, the Employer is required by city ordinance to provide liability insurance on the vehicles used by

both day-lease drivers and owner-operators. In the event of an accident, the insurance covers the taxicab, the passenger(s) in the taxicab, the other vehicle, if another vehicle were involved, and the passengers of that vehicle. The Employer does not offer or provide insurance coverage for the drivers, but drivers may opt to buy insurance on their own.

Some of the Employer's taxicabs are outfitted with advertisements for various vendors. The revenues from such advertisements belong solely to the Employer and drivers who display such advertisements on their vehicles do not obtain any additional profits from doing so. However, the drivers are not required to carry advertisements on their vehicles and are free to refuse to do so.

#### Vehicle Maintenance/Repairs

All of the Employer's vehicles are on a preventive maintenance schedule. When drivers log into the Employer's system, they log in the mileage of the vehicle and when 5,000 miles have been logged since the last maintenance, drivers are notified that maintenance is due. The Employer provides routine maintenance services for day-lease drivers at its facility. Owner-operators may also bring their vehicles for maintenance into the Employer's facility, but have the option to go to a garage of their choice, as long as they present a certificate to the Employer showing that maintenance has been performed.

When a taxicab becomes involved in an accident, the Employer pays for the vehicle's repair costs over \$1,500. The owner-operators and day-lease drivers are liable for the first \$1,500 of damage caused to the vehicle. Each driver deposits \$20 per week toward an individual repair fund until the cumulative amount of such deposits equals or exceeds \$1,500. The Employer pays drivers ten percent simple annual interest on the deposit balance and returns the money to the drivers upon termination or cancellation of their operating agreement with the Employer.

#### **ANALYSIS**

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The Supreme Court has held that a determination of independent contractor status is governed by the common law agency test. See *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968); see also, *Roadway Package System, Inc.*, 326 NLRB 842 (1998); *Dial-A-*



*Mattress Operating Corp.*, 326 NLRB 884 (1998). Although the extent of control exercised by the employer is an essential factor to consider in determining whether one is an employee or an independent contractor, the Court in *United Insurance* stated that “there is no shorthand formula or magic phrase that can be applied to find the answer [to the issue of independent contractor versus employee status] but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *United Insurance*, 390 U.S. at 256.

Applying the common-law agency test to the facts of this case, I find that the factors weigh more strongly in favor of independent contractor status for all of the Employer’s drivers. In reaching this conclusion, I am persuaded by the fact that the Employer’s drivers have substantial opportunities to make an “entrepreneurial profit beyond a return on their labor and capital investment.” *Dial-A-Mattress*, 326 NLRB at 891. In considering whether an individual is an independent contractor, the Board has noted that whether a lessee has a “substantial investment” in the instrumentalities of his or her work is an important factor to consider. *City Cab Co. of Orlando, Inc.*, 285 NLRB 1191, 1193 (1987). In the instant case, all drivers pay lease fees that range from \$80 (day-lease rates) to \$510 (weekly lease). “Paying lease or rental fees over a period of time results in a substantial [equity] investment on the part of a lessee.” *Id.* at 1194. Furthermore, the fact that an owner-operator “may never acquire title to the taxicab he/she drives is not all that important” because what is important is “that the lessee has a ‘substantial investment’ in the instrumentalities of his/her work.” *Id.*

In the taxicab industry, there are two elements that are dispositive in determining that no employer-employee relationship exists: (1) “the company’s lack of control over the manner and means by which the drivers conducted business after leaving the [company’s] garage”; and (2) the lack of any relationship between the company’s compensation and the amount of fares collected.” *City Cab of Orlando*, 285 NLRB at 1193, citing *Air Transit*, 271 NLRB 1108, 1110 (1984). See also, *Checker Cab Co.*, 273 NLRB 1492 (1985). The Board has further held:

When a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a strong inference

that the cab company involved does not exert control over “the means and manner” of his performance.... The surrender of the right to make the drivers account for their earning causes a fundamental change in the relationship between the companies and their drivers which will usually remove the latter from the category of “employees.”

*City Cab Co. of Orlando*, 285 NLRB at 1194, citing *Seafarers Local 777*, 603 F.2d 862, 879 (D.C. Cir. 1978).

I find that in the instant case, the Employer has no “financial incentive to exert control over its drivers, other than such as is necessary to immunize the proprietor of a cab from liability which arises from its operation by virtue of the lessor’s ownership.” *Id.* I also find that the Employer does not have sufficient control over the drivers’ means and manner by which they conduct their taxicab business so as to find employee status for the drivers. In the instant case, the Employer charges drivers a flat fee that is neither adjusted or varied depending on how much individual drivers earn or how many hours or days they work or how many fares they pick up during their work schedules. As long as drivers are current on their lease payments, the Employer does not require drivers to work at all or determine how drivers find fares. The drivers keep what they earn and have the opportunity to set the hours of operation for their individual enterprises. Furthermore, the drivers have the sole discretion to seek and obtain their passengers from a variety of venues (*e.g.*, the Employer’s dispatch system, personals, flags, taxi stands, hotels, or any combination thereof) without input from the Employer. All drivers have the right to cultivate “personals” and determine for themselves how much of their own capital they will spend on business cards, cell phones, pagers, or other means of advertisement and supplies in furtherance of their independent enterprises. Under similar circumstances, the Board has relied upon such evidence in finding that such drivers are not employees within the meaning of the Act. See, *e.g.*, *City Cab Co. of Orlando*, 285 NLRB 1191 (1987); *Checker Cab Co.*, 273 NLRB 1492, 1942-93 (1985); *Air Transit*, 271 NLRB at 1110-11.

The record establishes that the Employer has very few rules and regulations of its own. Many of the facts claimed by the petitioner allegedly demonstrating control over the means and manner of the drivers’ performance in this case stem from city ordinances and Jax Port guidelines. The Petitioner points

to the fact, for example, that the Employer (1) does not allow a trade name other than “Gator City Taxi” on the exterior of its vehicles; (2) trains and informs drivers with respect to accepted taxicab practices and regulations; (3) regularly inspects and requires maintenance of leased vehicles for safety purposes; (4) requires drivers to complete accepted dispatch calls; (5) ensures that drivers’ for-hire permits (issued by the Department) state the cab company for which they drive; and (6) does not allow all vehicles to work at the airport. “The Board and courts have held that requirements imposed by governmental regulations do not constitute control by an employer but is control by the governing body.” *City Cab Co. of Orlando, Inc.*, 285 NLRB at 1193, citing *Checker Cab Co.*, 273 NLRB 1492 and *Seafarers Local 777 v. NLRB*, 603 F.2d 862. Accordingly, I find that these efforts reasonably undertaken by the Employer to maintain its property, train drivers and to comply with guidelines imposed by government entities do not support a finding of employee status.

The two cases Petitioner primarily relies upon in support of its argument that the drivers are employees within the meaning of Section 2(3) of the Act are distinguishable. In *Yellow Cab Co.*, 312 NLRB 142 (1993), the Board found employee status largely because the rental fee paid by the drivers was based solely on the number of miles driven, thereby “result[ing] in a direct correlation between the employer’s income and the amount of fares collected by the drivers” *Id.*, 312 NLRB at 144; and because the employer controlled the shifts and number of hours driven by each driver. Here, by contrast, the Employer collects the same fee regardless of the number of miles driven or fares collected, and there is no evidence supporting a finding that the Employer controls the shift or number of hours driven. Day-lease drivers are required to report to the company every 24 hours to pay their fees, not to start their “shift.” The record does not indicate that day-lease drivers must begin conveying passengers from the time they pay their lease fees at the Employer’s facility or be subject to some penalty. If drivers are late, they are assessed a late fee because their lease payment for that day is late, not because they started their work schedule late.

The Board found that other factors mentioned by Petitioner in its brief to be secondary to the factors mentioned above, *Id.*, 312 NLRB at 144 n.7. Additionally, several of these secondary factors also

do not favor the Petitioner's argument. Unlike here, the employees in *Yellow Cab* were prevented from subleasing cabs, were required to complete waybills at the end of their shift, and had no equity investment in their cabs. And although here the drivers are subject to a dress code, because the Employer has registered a uniform with the City of Jacksonville, drivers must be in uniform to be in compliance with the ordinance. With regard to the standardized lease terms, the evidence showed that drivers were free to decide what type of contract they will enter into with the Employer and consequently, the terms by which they must comply. "The fact that the lessor sets standardized lease terms in a leasing agreement is indicative only of the relative bargaining power of the lessor and is irrelevant to the issue of control in determining the status of drivers regarding whether they are employees or independent contractors." *City Cab Co. of Orlando*, 285 NLRB at 1194.

Likewise, in *Elite Limousine Plus*, 324 NLRB 992 (1997) the employer had "a substantial and direct financial stake in the amount of fares collected by the drivers." *Id.*, 324 NLRB at 1002. The employer therein also "essentially micromanaged the drivers on issues that do not involve government regulations and has imposed a detailed and severe system of sanctions to enforce the rules it wants the drivers to follow." *Id.*, 324 NLRB at 1003. By contrast, here the Employer maintains few rules, other than those dictated by governmental agencies discussed above.

Contrary to the Petitioner, I do not find that the availability and use of the dispatch system by the drivers is a means by which the Employer exerts control over the drivers. The use of the dispatch system is strictly optional and the Employer becomes involved in the drivers' activities only to the extent that the drivers choose to use the system and reap its benefits. Drivers are not subject to the rules pertaining to acceptance and rejection of dispatched fares or locating and tracking drivers geographically, for example, if they do not turn on the dispatch computer and/or log on to the dispatch system. Drivers who choose not to exercise their independent business acumen but, instead, rely solely on the Employer for fares must abide by the rules, which foster a systematic method of ensuring that customers receive taxicab services while fares are distributed to numerous drivers in a fair manner. The fact that some drivers derive a

majority of their fares from the Employer's dispatch system does not render the use of the system mandatory.

I also do not find significant the evidence presented regarding taxicab advertisements or the reduced profits that drivers may receive from vouchers or credit card payments. Although the Employer receives revenues from advertisements placed on cabs, the record is clear in establishing that drivers are not required to carry the advertisements and that several of them have refused to do so without any penalty from the Employer. The Board has stated that the issue of "whether the lessor or the lessee receives the revenues from advertisements on the taxicabs [is] totally irrelevant to the issue of an employer's control over the lessees and virtually irrelevant to any other consideration in the determination of employer/independent contractor status." *City Cab Co. of Orlando*, 285 NLRB at 1195, citing *NLRB v. Associated Diamond Cabs*, 702 F. 2d 912, 921 (11<sup>th</sup> Cir. 1983). With respect to the Employer's acceptance of vouchers, I find that although vouchers are generally below meter rates, the Employer does not garner any profits from its use. I find that the use of vouchers is simply a means of establishing a regular customer base for the ultimate benefit of drivers. Finally, the record shows that drivers are reimbursed for credit card transactions as soon as they are submitted, while the Employer must wait 30 to 90 days for payment from the credit card company. I find that the Employer's acceptance of credit card payments from passengers to be another means to secure a larger customer base and do not find the Employer's five percent processing charge to be so significant as to find drivers to be employees rather than independent contractors.

Accordingly, based upon the above and the record as a whole, I find that none of the drivers that the Petitioner seeks to represent are employees within the meaning of the Act. Rather, I find these individuals to be independent contractors.

### **ORDER**

IT IS HEREBY ORDERED that the petition in the above matter be, and it hereby is, dismissed.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by July 24, 2001.

**DATED** at Chicago, Illinois, this 10<sup>th</sup> day of July, 2001.

/s/ Elizabeth Kinney  
Elizabeth Kinney, Regional Director  
National Labor Relations Board  
Region 13  
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Chicago, Illinois 60606

177-2484-5000  
177-2484-5067-6000